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No. 10-257

Supreme Court, U.S.
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In the Supreme Court of the United States

NORTH COUNTY COMMUNICATIONS CORP.,
Petitioner,

v.

CELLCO PARTNERSHIP,
D/B/A VERIZON WIRELESS-CA (OCN 6006), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included within the petition for a writ of certiorari remains accurate.

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STATUTES

Communications Act of 1934, Title 47 of the United States Code, as amended by the Telecommunications Act of 1996, 110 Stat. 56:
47 U.S.C. § 201(b) 3
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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents' repeated description of the parties' relationship as a "bill-and-keep arrangement," BIO 13, 15, proves the petition's point. There *is* no "bill-and-keep arrangement" – or any reciprocal compensation regime – between the parties, which is precisely why the Ninth Circuit's misapplication of *Global Crossing Telecomm., Inc. v. Metrophones Telecomm. Inc.*, 550 U.S. 45 (2007) deserves the Court's attention. Respondents' repeated reliance on a default "bill and keep" relationship is contrary to both the facts and the law.

The statutory provision to which Respondents point, 47 U.S.C. § 252(d)(2)(B)(i), provides that nothing in § 252(d)(2), governing "pricing standards" for purposes of an ILEC's compliance with § 251(b)(5), shall be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)....". But while that evinces Congress's intent to recognize bill-and-keep arrangements as a permissible means of satisfying a party's reciprocal-compensation duty, Respondents err in asserting that they and North County "have been using" such an arrangement. BIO 13, 15.

"Bill and keep" is "an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other

network...." *Pac-Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1122 n.7 (9th Cir. 2003), *citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, 9204 n.6 (2001). As a compensation method, it is an alternative to the reciprocal compensation agreements provided for in 47 U.S.C. § 251(b)(5). But the FCC's definition encompasses two critical points.

First, a "bill and keep" arrangement assumes a symmetric exchange of traffic between the parties, each sending approximately the same amount of traffic it receives from the other. Second, and even more important, to fulfill its obligation of reciprocal compensation, each "bill and keep" participant agrees to the arrangement – it is not a default schema to be forced unilaterally upon CLECs by CMRS providers. As the parties agree, traffic here is for the most part a one-way street: CLECs such as North County terminate calls from CMRS providers' customers, but send few, if any, the other way. This near-complete assymetry of traffic allows the CMRS providers effectively to free-ride on the CLECs' networks, and is why this Court's intervention is essential. To these established wireless behemoths, "bill and keep" means they leave upstart CLECs holding the bill for this one-sided arrangement, and the latter keep paying it – all under the auspices of Federal law. And such abuse will continue, contrary to *Global Crossing* and the Act, unless this Court intervenes.

Respondents further err in seeking refuge behind various inchoate FCC proposals for the potential replacement of intercarrier compensation with "bill

and keep." BIO 20, *citing, inter alia, Developing a Unified InterCarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9616-9618, 9629 at ¶¶ 11-18, 52 (2001) ("Intercarrier Compensation NPRM") and Federal Communications Commission, *Connecting America: FCC National Broadband Plan*, (rel. March 16, 2010) ("National Broadband Plan"), Recommendation 8.7 at 148. Neither the NPRM nor the National Broadband Plan is an order, *see American Council on Educ. v. FCC*, 451 F.3d 226, 235-236 (D.C. Cir. 2006) (rejecting reliance on proposed FCC rule since "a *proposed* rule is not a *final* rule") (emphasis in original). Thus, neither can legitimize Respondents' continued subjection of North County and other CLEC's to what is essentially indentured servitude.

Finally, while Respondents concede that a regulation that implements § 201(b) gives rise to a private cause of action under *Global Crossing*, they make the puzzling assertion, without citation, that "[t]he Ninth Circuit correctly concluded that [47 C.F.R. 20.11(b)] is not such a rule." BIO 11. To the contrary, the rule indeed implements § 201(b). *See* Pet. 4-5.

Respondents' mischaracterization of the parties' relationship as "bill and keep," and their misplaced assertion that they may unilaterally force such an arrangement upon unwilling CLECs, underscores why their refusal to pay or negotiate a reciprocal compensation arrangement is "unjust or unreasonable" under 47 U.S.C. § 201(b), and gives rise to a private cause of action under § 207. *Global Crossing*'s continued vitality requires rejection of Respondents' position.

CONCLUSION

The petition for a writ of certiorari should be granted.

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